Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 00-4
Southwestern Bell Communications Services,	)	
Inc. d/b/a/ Southwestern Bell Long Distance	)	
for Provision of In-Region, InterLATA	)	
Services in Texas	)	

COMMENTS OF ALLEGIANCE TELECOM, INC. IN OPPOSITION TO SOUTHWESTERN BELL'S SECTION 271 APPLICATION FOR TEXAS

Allegiance Telecom, Inc. ("Allegiance"), by its undersigned counsel, hereby submits its comments on the Application of Southwestern Bell Telephone Company ("SWBT") for authority to provide in-region long distance services in Texas pursuant to Section 271 of the Communications Act of 1934, as amended (the "Act").

Allegiance is a facilities-based competitive local exchange carrier ("CLEC") and interexchange carrier ("IXC") based in Dallas, Texas. Allegiance provides facilities-based and resold CLEC, IXC and international services, and is rapidly expanding to offer various competitive services, Internet access, operator services, and high speed data services to areas throughout the country. Allegiance is currently providing service in 19 markets in the United States, including several in Texas, with plans to be operational in 36 metropolitan areas by the end of 2001.

SUMMARY

SWBT's Application fails to demonstrate that its network and operational systems are open and adequate to support robust competition in the local telephone market of Texas, nor has SWBT demonstrated that granting its application is in the public interest. Indeed, the application

omits data that the Commission said, only last month, would be a *prerequisite* to approving future section 271 applications. The data SWBT *does* present is equivocal, at best, and in some cases, just plain wrong. For example, Allegiance serves *fewer than half as many lines as SWBT claims.* Assuming that SWBT has made similar mistakes for other CLECs, there is good reason to believe that SWBT has significantly overstated the extent of actual competition in the state. SWBT's performance measures are similarly flawed. Observations for most activities have been collected for just three months, and in many instances — including the all-important measurement for "hot cut" performance — there is no reliable data whatsoever.

Instead of the hard evidence of compliance that the law requires, SWBT asks the Commission to trust it. As the basis for that trust, SWBT points to its performance to date, the determination of the Texas PUC to open Texas' markets to competition, and the work done by its "independent" consultant, Telcordia. But none of these factors provides a basis for this Commission to find that Texas' markets are even *currently* open to competition, let alone that they are irreversibly open, as the Commission requires.

The Telcordia study, for example, was deeply flawed, and in no way comparable to the work done by KPMG in New York. Illustrative of its deficiencies, Telcordia gave SWBT's DSL provisioning a clean bill of health, despite the recognition that there was very little data to justify that assessment. *See* Application at 39-43. Just four days ago, however, the Texas PUC endorsed the findings of an arbitration panel that found SWBT discriminatorily provisioned DSL, and at grossly inflated prices.

Nor can the Commission depend on the Texas PUC to make sure that SWBT cleans up its act. At the behest of SWBT's well-financed lobbyists, the Texas legislature has taken away much

of the PUC's regulatory authority. Thus many of the tools that the PUC previously relied upon to promote local competition in the state — tools that are available to the New York PSC — are no longer at the Texas PUC's disposal.

If the Commission, nonetheless, decides to grant SWBT's application, it should put in place substantial and readily enforceable anti-backsliding mechanisms to assure SWBT's future compliance. To further promote competition, the Commission should establish a "customer liberation" fresh-look policy that permits consumers to opt out of their long-term contracts with SWBT.

ARGUMENT

I. SWBT IS NOT IN COMPLIANCE WITH THE COMPETITIVE CHECKLIST

Section 271 requires proof that the applicant BOC "is providing" and has "fully implemented" "each" item of the Competitive Checklist. 47 U.S.C. §§ 271(c)(2)(A), (c)(2)(B), (d)(3)(A)(i). To be "providing" a Checklist item, the BOC must show not only "a concrete and specific legal obligation" to furnish the item pursuant to an interconnection agreement, but "must demonstrate that it is presently ready to furnish each Checklist item *in the quantities that competitors may reasonably demand and at an acceptable level of quality.*"[1] To have "fully implemented" the Checklist, moreover, the BOC must demonstrate that it has satisfied each of its Checklist obligations at the time of its filing. Mere "paper promises" of future compliance do not

[1] *Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 13 FCC Rcd. 20543, ¶ 110 (1997) ("*Ameritech Michigan Order*").

suffice. *Id.* ¶¶ 55, 179; *see also* 47 U.S.C. § 160(d) ("the Commission may not forbear from applying the requirements of Section 251(c) or 271 . . . until it determines that those requirements have been fully implemented").

A. SWBT Has Not Demonstrated That It "Is Providing" Adequate Service to CLECs

SWBT bears the burden of establishing that it is providing the services and facilities required by CLECs in a nondiscriminatory manner. *Bell Atlantic New York Order* ¶ 47; *Ameritech Michigan Order* ¶ 43. In order to meet this burden, SWBT must offer appropriate performance measurements that *demonstrate* it is providing nondiscriminatory performance for CLECs. *Ameritech Michigan Order* ¶ 204. In addition, appropriate performance measurements are a necessary component of self-executing enforcement mechanisms, which the Commission has found essential to prevent backsliding by a BOC after it is authorized to provide long distance service. *Second BellSouth Louisiana Order* ¶ 364.

The performance measurements submitted by SWBT with its application are deficient in two key areas that the Commission has stated are *per se* prerequisites to the approval of a section 271 application: "hot cuts" and DSL loop provisioning. Try as SWBT does to dance around these deficiencies, its application simply lacks *any* meaningful performance data demonstrating that it is, in fact, "providing" these services to competitive LECs "at an acceptable level of quality." *See Ameritech Michigan Order* ¶ 110.

1. Hot Cuts

The Commission explained in the *Bell Atlantic New York Order* the importance of on-time hot cut performance. The requirement is imposed by Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, which requires SWBT to provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." As the Commission reiterated in the *Bell Atlantic New York Order*, "one way that a BOC can demonstrate compliance with checklist item 4 is to submit performance data evidencing the time interval for providing unbundled loops and whether due dates are met." *Bell Atlantic New York Order* ¶ 270.

The non-discriminatory provisioning of "hot cuts" is of central importance to a competitive LEC's efforts to compete. The measurement is so important that deficiencies in the relevant data Bell Atlantic submitted with its New York Section 271 filing convinced the Department of Justice to recommend the denial of that application. *See Bell Atlantic New York Order* ¶¶ 173-77. Although the Commission ultimately took a different view of the quality of Bell Atlantic's "hot cut" data, it did not minimize the importance it places on a BOC's obligation to *prove* that it "is providing" adequate service in this vital area. *Id.*

The data deficiencies that caused so much consternation in the New York proceeding, however, are nothing compared to the deficiencies in SWBT's Application. First and foremost, SWBT *admits that it has no hot cut performance data* as the measure was defined in the *Bell Atlantic New York Order*. Application at 98. In the place of this all-important measurement, SWBT instead offers a proxy, which, upon closer inspection, turns out to be no substitute at all. As SWBT's affiant explains, this proxy measures premature disconnects and SWBT-caused

delayed cutovers, but omits several activities (such as the due date minus two check for dial tone) that were found so important in New York. *See* Affidavit of William R. Dysart ¶ 651; *compare Bell Atlantic New York Order* ¶¶ 186, 304-05. Moreover, SWBT's "data" includes coordinated cutovers "without loop," – a measurement that is of little or no relevance to a facilities-based competitor such as Allegiance. Dysart Aff. ¶ 651. Although SWBT claims that the measure is disaggregated from cutovers "with loop," it is unclear where, or if, this disaggregated figure actually appears in SWBT's massive filing. Thus, SWBT has failed to demonstrated the extent to which its purported compliance is based on the relevant measurement.

Just as troubling, SWBT's data is based on a sample of fewer than 1,000 loops provisioned in August through October, *id.* ¶ 653, a figure that is difficult to reconcile with the tens of thousands of lines SWBT claims that competitors now account for in Texas. Not only is this figure puzzling when viewed in isolation, but it is only a fraction of the hot cuts that Bell Atlantic presented as part of the New York proceeding. *See Bell Atlantic New York Order* ¶ 277.

These deficiencies with SWBT's "hot cut" data apparently caught the Commission's eye, which led to SWBT's *ex parte* submission of January 21, 2000. This submission has muddied the waters even further. First, SWBT dropped a bombshell, admitting that "[n]ot all cutover logs during [the August-October measurement period] contained both a start and stop time, due to varying proficiency levels among technicians responsible for recording this information." Jan. 21, 2000 *Ex Parte* at 1. Thus, not only does SWBT's hot cut data measure the wrong activities, but the integrity of that data is questionable, as well. Second, although SWBT finally submitted data on the quality of its hot cuts, as the Commission made clear was required in the *Bell Atlantic New York Order*, this data contains measurements for *only ten days* of performance. It thus

cannot possibly constitute evidence that SWBT is "providing" adequate service, as required by the Act.

Based on these deficiencies alone, the Commission must reject SWBT's application.

2. DSL Provisioning

SWBT makes the astounding claim "that CLECs ha[ve] raised no outstanding issues relating to ADSL." Application at 40. This claim is followed by a passing reference to the PUC's "supplemental proceeding" related to SWBT's provisioning of xDSL-capable loops, *id.* at 41, the terms of which SWBT promises to implement, *id.* at 42. This characterization grossly misrepresents the status of DSL provisioning in Texas. The PUC "supplemental proceeding" to which SWBT refers was, in fact, an arbitration between SWBT and two CLECs who contested the terms and conditions under which SWBT offered interconnection for DSL. The arbitrators' recommended decision, which found numerous deficiencies with SWBT's xDSL provisioning, was issued on November 30, 1999 – a fact barely mentioned in SWBT's application.[2]

On January 27, 2000, the Texas PUC affirmed the arbitration decision, effectively finding that SWBT has been providing DSL on discriminatory terms and conditions, and at grossly inflated prices. Among other things, the PUC found that SWBT has (1) placed unreasonable restrictions on line conditioning; (2) imposed arbitrary DSL line-length restrictions; (3) not made adequate OSS interfaces available to CLECs; (4) been assessing line conditioning and intercon-

[2] Arbitration Award, Petition of Rhythms Links, Inc. and DIECA Communications, Inc., d/b/a Covad Communications Co. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Dkt. 20272 and 20226 (Public Utility Commission of Texas) (Nov. 30, 1999).

nection fees approximately 40 times greater than cost-based rates; and (5) adopted systems and procedures that assure CLECs receive inferior quality loops compared to those SWBT provisions for itself. Although SWBT's section 271 application states that it will abide by the Texas PUC's decision, it has indicated that it may, nonetheless, appeal the Order.

The implications of the Texas PUC's January 27 DSL Order are two-fold. First, it raises troubling questions about the reliability of Telcordia's work, which had given SWBT a clean bill of health in this area. (Additional concerns with Telcordia's work are addressed in the following section.) *Second*, the Order means that SWBT's application must be rejected. As with the "hot cut" data, the situation is far worse here than it was in New York. In New York, the Commission overlooked the undisputed problems with Bell Atlantic's DSL loop provisioning based on (1) the fluidity of the situation (the Commission noted that competitors had only just begun placing DSL orders in large numbers) and (2) the fact that the New York PSC had launched a proceeding to examine Bell Atlantic's DSL provisioning. *Bell Atlantic New York Order* ¶¶ 316-20. Moreover, the Commission noted the "sharp disparities in the record regarding the quality of Bell Atlantic's xDSL loop provisioning," and thus reasonably deferred to the New York PUC's recommendation. *Id.* ¶ 325. Finding that Bell Atlantic's application "present[ed] unique factual circumstances," *id.* ¶ 322, the Commission, therefore, decided to disregard the Department of Justice's recommendation and approve the application. *See id.* ¶¶ 327-28.

Here, no such "unique factual circumstances" are present. The Texas PUC has found that SWBT has not been "providing" adequate service in this vital area, and SWBT was provided clear notice of the importance of this issue in the *Bell Atlantic New York Order*. Under the plain terms of the Act, therefore, SWBT's application must be rejected.

3. The Telcordia Study Is Unreliable

In approving Bell Atlantic's New York application, the Commission relied extensively on the findings of independent third party tests conducted by KPMG. *See, e.g., Bell Atlantic New York Order* ¶ 10. As the Commission noted, "[t]he rigorous, comprehensive third party testing in New York identified numerous shortcomings in Bell Atlantic's OSS performance that were subsequently corrected and retested." *Id.*

KPMG conducted two main types of tests. *First*, it evaluated Bell Atlantic's procedures from a transactional and operational standpoint. Partnering with Hewlett-Packard, KPMG acted like a "pseudo-competing carrier" attempting to establish initial interconnectivity and interfaces and to provision customers through Bell Atlantic's network. KPMG thus was able to learn valuable "real world" lessons about the problems CLECs face at each stage of their rollout, and it used those findings to improve Bell Atlantic's operational procedures. *Id.* ¶ 96. KPMG also audited Bell Atlantic's actual operations, capturing measurements that were used to determine whether CLECs received adequate service. Though observers disagreed with certain of its findings, no one questioned KPMG's independence or the rigor of its approach.

Telcordia's work in Texas paled in comparison. First, Telcordia never established its independence from SWBT. For example, Telcordia routinely shared its findings with SWBT prior to reporting them to the PUC and the CLEC community. Similarly, Telcordia did not independently test the performance measurement data, but rather relied exclusively on the data that SWBT provided.

Even more troubling than these procedural deficiencies was the superficiality of Telcordia's approach. In the New York tests, KPMG / Hewlett Packard conducted themselves like CLECs attempting "to get into business" and provision customers. KPMG exposed numerous problems with Bell Atlantic's documentation and operational procedures during this process, and the "military style" testing assured that problems were corrected as they were discovered.

Telcordia's tests of SWBT's operational procedures, on the other hand, involved only a review of SWBT's documentation and an *ex post* evaluation of orders placed by the competing LECs. Though Telcordia claims to have worked with the CLECs to learn about the problems they encountered doing business with SWBT, this dialogue was superficial at best, and no substitute for actually transacting with SWBT itself, as KPMG did in New York.

Illustrative of both the shallowness of Telcordia's work and its over-reliance on SWBT is the claim SWBT makes in its Application that, "[w]here SWBT has missed a measure it often has met a related measure that examines the same underlying data from a different perspective." Application at 19. The claim illustrates Telcordia's failure to compare performance data across related measures to assess consistency. The converse to SWBT's explanation is that the measurement that showed failure may be the better measure of performance than the one indicating success. Allegiance and other CLECs believe that Telcordia's failure to rigorously evaluate SWBT's systems will become apparent as CLECs' demands grow. That more problems have not surfaced to date reflects more the light demands that have been placed on SWBT's systems, than on SWBT's preparedness for robust competition.

B. SWBT Has Refused To Interconnect With CLECs As Required By the Act

Under Section 251(c)(2), SWBT is under "the duty to provide" a requesting CLEC "interconnection . . . at any technically feasible point within the carrier's network." Compliance with this requirement is the *very first* item on the Section 271 competitive checklist, and despite its central importance to local competition – or perhaps because of its importance – SWBT has obstinately evaded compliance with this fundamental legal obligation.

For example, in August 1999, Allegiance requested that SWBT provide interconnection with a third switch that Allegiance planned to install near Dallas, Texas to relieve congestion on its network. *See* Declaration of Robert W. McCausland (Attachment 1). SWBT refused to provide the interconnection, however, based on its claim that Allegiance planned to use the switch primarily to route traffic to Allegiance's Internet Service Provider ("ISP") customers.

Based solely on Allegiance's plan to route some Internet traffic over the new switch, SWBT claimed that "this interconnection arrangement is sufficiently different from existing interconnection arrangements to warrant negotiations concerning the appropriate terms and conditions of interconnection." Sep. 22, 1999 letter from Jo Ann Gallardo to Ron Vehige (Att. 1, ex. A). SWBT maintained this position despite the fact that the traffic Allegiance intended to route to its new switch was the very same traffic that Allegiance had been running through its existing two switches in Dallas.

SWBT finally relented in December 1999 – but only after Allegiance complained to the Texas PUC. Allegiance understands that other CLECs are submitting similar complaints about SWBT's refusal to provide interconnection or pay reciprocal compensation. Allegiance main-

tains that these complaints, taken together, constitute more than "anecdotal" evidence of SWBT's flagrant flouting of its legal obligation. Rather, they constitute a pattern and practice of non-compliance that require the rejection of SWBT's section 271 application.

II. SWBT'S ENTRY INTO THE INTEREXCHANGE MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST

Finally, SWBT's application should be denied because SWBT has not met its burden to show that its interLATA authorization would be "consistent with the public interest, convenience and necessity." Section 271(d)(3)(C). Among the many considerations that must factor into this "public interest" determination is the extent of actual competition that exists in the applicant's state, and the likelihood that the applicant will "backslide" following approval of its section 271 application. *See Bell Atlantic New York Order* ¶ 423. As the Commission has concluded, however, the public interest standard of Section 271 requires it "to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected." *Id.* Thus, the public interest inquiry requires a wide-ranging inquiry into all the facts and circumstances of a particular BOC's application, and is *not* tied to any specific set of considerations.

With respect to SWBT's application, Texas' markets show paltry penetration by new entrants — and the actual extent of that penetration is subject to considerable question. Moreover, it should be plain that the limited progress that SWBT has made in opening its local markets reflects primarily its incentive under Section 271 to comply with the Act. Without that incentive,

SWBT can be expected to revert to the ways that earned it the nickname "Bully Bell" – a style that SWBT has never actually abandoned. *See* Christopher Palmeri, *Bully Bell*, FORBES (April 22, 1996).

First and foremost, Allegiance is gravely concerned that SWBT's "estimating methodology" has led it to grossly overestimate the actual extent of competition in Texas. Allegiance is in a unique position to make this determination, because SWBT's application identifies it as the largest facilities-based CLEC in Texas. *See* Confidential Affidavit of John S. Habeeb 13-15 (Table 3). Without revealing in this public comment the precise numbers reported by SWBT or Allegiance's actual customer base, suffice it to say that SWBT has significantly over-estimated the actual number of lines that Allegiance serves. Indeed, Allegiance serves fewer than half as many lines as SWBT claims. *See* Declaration of Elizabeth Howland.

This is a troubling error. If the error systematically plagues all of SWBT's estimates – and there is no reason to believe it does not – then SWBT has grossly overestimated the actual state of local telephone competition in Texas. At a minimum, the Commission should solicit reports from all the carriers listed in Table 3 of the Habeeb Affidavit so as to determine the extent to which SWBT has miscalculated this vitally important statistic. Indeed, the mere fact that SWBT has overstated the size of its largest competitor three-fold implies that its statewide numbers must be inflated to some extent.

If SWBT has intentionally misreported this figure, that would fit well with its corporate history and corporate style. For history shows that SWBT has done everything within its power to block local competition. Even before passage of the 1996 Act, the company is reported to have retained 86 registered lobbyists, at a cost of over $11 million to its captive customers, to lobby

the Texas legislature into enacting legislation whose sole aim was "to delay real competition in Texas' local markets." *Id.* This effort was so successful that SWBT repeated the trick this past year, and managed to push through legislation described by one Texas' newspaper as "written by hirelings of the local telephone industry and designed to attain maximum advantage for the companies at the expense of consumers." Editorial, *Out of the Loop: Legislators Seem Unaware of Telephone Battle Shaping Up*, HOUSTON CHRONICLE (May 11, 1999) (1999 WL 3989592). (The implications of this recent legislation for the Commission's review of SWBT's Section 271 Application are discussed further below.)

After the Telecommunications Act became law, SWBT sought to maintain its entrenched position through perpetual litigation. Among other things, SWBT has appealed the rules governing access and interconnection to its network, the decisions of state arbitrators, and the constitutionality of the Act. For example, within days of this Commission's decision denying its premature Section 271 application for Oklahoma, SWBT filed suit in Wichita Falls, Texas to have Section 271 declared a bill of attainder – a ruling that could have enabled it to enter the long-distance market without first having to demonstrate that it had opened its local market to competition.[3] SWBT took this action notwithstanding that it had sought enactment of Section 271 and strongly supported passage of the Act.

Although SWBT's "bill of attainder" theory was squarely rejected by the court of appeals,[4] and SWBT subsequently abandoned the theory at the PUC's insistence, SWBT has

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[3] *SBC Communications, Inc. v. FCC*, 1998 WL 119707 (N.D. Tex. 1998).

[4] *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998).

advanced a host of other frivolous appeals in the hope of frustrating the competition-inducing goals of the Act. A decision by a federal district court rejecting one of these competition-blocking appeals aptly summarizes SWBT's scorched earth tactics:

> [The court is] troubled by SWBT's tactics in this case. SWBT's penchant for re-hashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and, most importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case — over seven hundred pages in total — could probably have been cut in half had SWBT not fought tooth and nail for every single obviously non-meritorious point.

Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., 1998 WL 657717, *17 (W.D. Tex).

SWBT has also used its enormous financial clout and buying power to coerce vendors to deny needed resources to new entrants. For example, shortly after AT&T announced that it had engaged Ernst and Young to develop AT&T's OSS interfaces, Ernst and Young suddenly withdrew from the project. As it turned out, Ernst and Young's Chairman had received a call from SWBT's chairman, Ed Whitacre, critical of Ernst and Young's plans to work for AT&T. *See AT&T Corp: Suit Says SBC Pressured Consultant to Drop Project*, THE WALL STREET JOURNAL B5 (June 16, 1998).[5] Although SWBT denied exerting any undue pressure on Ernst and Young to withdraw from the project, the Texas PUC expressly determined "that there are violations of the public interest, one of which is the corporate behavior and attitude of Southwestern Bell" and that SWBT's interference with AT&T's retention of Ernst and Young was

[5] AT&T's lawsuit was recently dismissed by the Texas court of Appeals. *See AT&T Corp. v. Southwestern Bell Telephone Co.*, 2000 WL 14711 (Tex. Ct. Ap.).

"indicative" of a company that was not "interested in getting local competition off and operating in this state."[6]

This historical pattern of corruption continues to this very day. SWBT's disingenuous failure to mention the PUC's DSL arbitration in its Application was touched upon earlier. SWBT's outrageous conduct during that proceeding, however, should raise even greater concern about its intentions. At the April 1999 hearing, a SWBT witness disclosed the existence of a methods and procedures manual that SWBT failed to provide during discovery. After further investigation, it became apparent that SWBT had failed to produce a number of other relevant documents, and the hearing was adjourned for further discovery.

The Arbitrators ultimately concluded that SWBT had intentionally withheld numerous relevant, material documents and intentionally produced incompetent witnesses. Most egregiously, SWBT officials issued an email (also not produced) to 81 employees directing them to destroy immediately all documents and delete all files from their computer that pertained to retail ADSL. SWBT was fined $850,000 as sanctions to reimburse plaintiffs for attorney's fees, costs and expenses incurred as the direct result of SWBT's abuse of the discovery process. Editorial, *A Quick Call: The PUC Should Be Troubled By Southwestern Bell's Reluctance To Open Up Local Phone Competition*, FORT WORTH STAR-TELEGRAM, Nov. 4, 1999.[7]

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[6] *See* SWBT Application Appendix Tab C-846 (May 26 1998 Letter from L. Kirk Kridner to Chairman Wood, et al. (quoting May 21, 1998 Open Meeting of Texas PUC at 328-29)).

[7] *See also* R.A. Dyer, *Southwestern Bell May Have Had Documents: Deleted E-Mail Raises Questions About Its Dealings With Rivals*, FORT WORTH STAR-TELEGRAM, Nov. 3, 1999 (1999 WL 23964290); Editorial, J.R. Labbe, *Boy, Did We Get Handed The Wrong Number*, FORT WORTH STAR-TELEGRAM, Nov. 5, 1999.

Perhaps even more harmful to Texas consumers than SWBT's illegal conduct during the DSL arbitration was the company's role this past year in pushing through the recent amendments to the Texas Utilities Code, which became effective September 1, 1999. Simply put, this legislation has straitjacketed the Texas PUC's authority to open Texas' local markets to competition. It is therefore impossible for the FCC to assume that the Texas PUC can supervise competition in Texas as effectively as the New York PSC can in New York. Although the Texas PUC is just as competent and dedicated, it unfortunately has been stripped of the powers that the New York PSC still possesses.

For example, the New York Commission has full discretion to decide, based on Bell Atlantic's performance, if and when Bell Atlantic may offer the following: customer-specific contracts, packaging and promotional offerings, volume and term discounts, and zone density pricing. Under the new Texas law, by contrast, SWBT may market special packaging and promotional offerings as early as July 1, 2000, and may offer volume or term discount offerings to businesses as early as September 1, 2000, regardless of the extent of competition in the state. Similarly, SWBT may offer customer-specific contracts to business or residential consumers, after September 1, 2003 – again without regard to the extent of competition in the state. *See* Tex. Utilities Code Ann. §§ 58.003, 58.004, 58.063 (2000).

Similarly, with respect to the policing of affiliate relationships, the New York Commission may exercise its discretion over Bell Atlantic's formation of in-region affiliates, may require structural separation of affiliates, and limit joint marketing with affiliates. The Texas PUC no longer has any independent authority in these areas. *See* Tex. Utilities Code Ann. §§ 54.102, 60.164, 60.165. Finally, Texas law severely limits the PUC's review of SWBT's new service

offerings and imposes a high burden even to suspend the effective date of SWBT's new tariffs. Tex. Utilities Code Ann. § 58.004. The New York Commission, by contrast, still has full discretion to suspend and review new service tariffs.

The dramatic loss of regulatory power the Texas PUC has suffered as a result of this SWBT-backed legislation heightens the need for this Commission's vigilance. As Allegiance's Chairman expl..ined – fruitlessly it turned out – to the Texas legislature before the legislation's enactment, granting SWBT such extraordinary pricing and service offering flexibility before competition is firmly established could deal a crippling blow to the goals of the 1996 Act. *See* Testimony of Royce Holland (April 29, 1999 before the Texas House State Affairs Committee) at 92-96. Mr. Holland explained the problem with then-bill, now law, as follows: "[If] AT&T ha[d] been allow[ed] unfettered pricing flexibility and the ability to bundle services and all of that in 1984 . . . MCI and Sprint would be a footnote to history . . . . This bill has the potential to make that happen here." *Id.* at 93.[8]

[8] The Texas legislation has been viewed as so harmful to local telephone competition that similar measures in states with less powerful lobbyists have been rejected. *See, e.g.*, Editorial, *US West Vents Pique on New Mexico*, ALBUQUERQUE JOURNAL (1999 WL 18134990) (expressing view that "Gov. Gary Johnson wisely vetoed . . . a bill that would have made the state safe for excessive telecommunications profits for the indefinite future").

III. IF THE COMMISSION NONETHELESS GRANTS SWBT's APPLICATION, THE APPROVAL SHOULD BE ACCOMPANIED BY CERTAIN PRO-COMPETITIVE CONDITIONS

A. The Commission Should Establish A Federal Anti-Backsliding Framework

In preparation for in-region interLATA market entry, the Commission should develop a federal framework for ensuring ongoing BOC compliance with checklist items and should do so in a manner consistent with Allegiance's February 1, 1999 Anti-Backsliding Petition.[9] Because BOCs must continue to satisfy the market-opening requirements imposed by section 271 after receiving in-region interLATA approval, a federal framework is needed to make the "rules of the road" clear to BOCs, competitors and regulators. Under such a framework the Commission could, for example, establish minimum performance standards to determine whether SWBT continued to satisfy its section 271 obligations.

While Allegiance is pleased with the steps that the Commission took to ensure that any backsliding by Bell-Atlantic-New York is addressed, Allegiance continues to endorse a three-tiered remedy structure that would "ratchet up" pressure to encourage a BOC to comply with its section 271 obligations and commitments, particularly in states where the PUC has more limited authority or resources than the New York PSC. Failure to comply with minimum performance standards would result in price reductions to competitive LECs. Continued noncompliance would result in the temporary suspension of the BOC's authority to provide new in-region interLATA

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[9] *See Development of a National Framework to Detect and Deter Backsliding to Ensure Continued Bell Operating Company Compliance with Section 271 of the Communications Act Once In-region InterLATA Relief Is Obtained*, Petition for Rulemaking, RM 9474 (Feb. 1, 1999) at 24-28 ("*Allegiance Petition*").

services (without affecting existing customer services) pursuant to the complaint procedure outlined in section 271(c)(6) of the Act. If these price reductions and the temporary suspension of section 271 authority for new and additional customer services failed to result in BOC compliance with the competitive checklist, the Commission would assess material fines on the BOC, as expressly authorized by the Act.

B. Before Granting Section 271 Relief To Any BOC, The Commission Should Adopt A "Customer Liberation" Fresh Look Policy To Ensure That Markets Remain Irreversibly Open To Competition

A Commission decision authorizing a BOC to enter in-region interLATA service markets in a state will add a new competitor to markets that have been open to new entrants for over a decade. By contrast, only in recent months have new entrants begun to make inroads into the BOCs' local telecommunications markets. To ensure that all local service providers have a fair opportunity to compete to serve all customers in a state, the Commission should implement a "customer liberation" fresh look policy, concurrently with its grant of section 271 authority in that state. Specifically, the Commission should adopt a "fresh look" requirement that permits customers to discontinue long term contracts for local exchange and intraLATA (and Corridor long distance services, where Corridors exist), without penalty. In Texas, for instance, Allegiance and other competitive LECs have encountered serious difficulties in competing against SWBT for local service customers who have been "locked into" SWBT term plans for Centrex, T1, PRI, and ISDN local services.

The Commission in the past has used a fresh look policy as a key tool in opening previously monopolized markets to competition. In 1992, for example, the Commission began the

process of opening the interstate exchange access market to competition by requiring incumbent LECs to offer "expanded interconnection" to competitive access providers.[10] The Commission recognized that some interstate access customers had entered into long-term access arrangements that raised "potential anti-competitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive access environment.[11] Consequently, the Commission permitted customers with special access arrangements entered into prior to adoption of its order and subject to service terms in excess of three years "to take a 'fresh look' to determine if they wish to avail themselves of a competitive alternative."[12]

Similarly, when the Commission began to streamline and relax its regulation of AT&T's interstate interexchange services, a fresh look policy was an important element in its overall approach to fostering competition in that market.[13] In its initial order, the Commission recognized that AT&T continued to wield market power in the market for 800 services because 800 numbers were not yet portable. Although the FCC concluded that many interstate interexchange services were available on a competitive basis from other providers, it expressed concern that until 800 number portability was implemented, AT&T could "leverage market power in 800 or inbound services with respect to these customers through the inclusion of 800 and inbound

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[10] *See Expanded Interconnection with Local Telephone Company Facilities,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992).

[11] *Id.* at ¶ 201.

[12] *Id.* (footnote omitted).

[13] *See Competition in the Interstate Interexchange Marketplace,* Report and Order (FCC 91-251), CC Dkt. No. 90-132, 6 FCC Rcd 5880 (1991).

services in [arrangements for other interstate long distance services]."[14] The Commission used a fresh look policy to address these potential anti-competitive effects. Specifically, it required AT&T to permit customers with service packages that included 800 as well as other services to terminate those packages "without the imposition of any termination liabilities" as soon as 800 numbers became portable.[15]

The Commission's use of a fresh look policy in the past has worked well in helping to bring the benefits of competition to consumers in those markets expeditiously. Further, the importance of the problem of customers "locked up" in long-term service arrangements previously has been presented to the Commission. Specifically, competitive LECs have urged the Commission that the potential assessment of termination penalties has deterred customers from switching their service from an incumbent LEC to a competitive LEC.[16] Allegiance recommends that the Commission similarly adopt a "customer liberation" or fresh look policy in conjunction with its grant of in-region interLATA authority to a BOC. Consistent with its prior decisions, the FCC should permit any customer with an existing long-term contract for local exchange or intraLATA toll services to terminate that agreement without incurring any termination penalties. This option should be available for a customer of any such agreement that is in effect as of the date of the Commission's order granting in-region, interLATA authority to a BOC. As discussed

[14] *Id.* at ¶ 149.

[15] *Id.*

[16] *See* KMC Telecom, Inc., Petition for Declaratory Ruling, CC Dkt. No. 99-142 (filed Apr. 26, 1999).

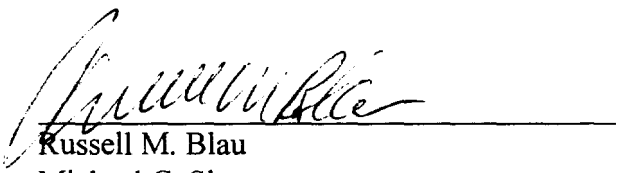
above, the Commission has broad authority under the Act to impose post-approval conditions on its grant of section 271 authority to a BOC.

This customer liberation policy would remove artificial barriers to full competition between competitive LECs and incumbent BOCs. Customers for the first time would have access to a full range of alternative services offered by different carriers. Competitive LECs for the first time would have a realistic opportunity to compete to serve these customers. And, BOCs for the first time would have to compete to retain these customers.

CONCLUSION

For the foregoing reasons, the Commission should deny the SWBT Application, or if approval is granted, impose the conditions set forth above.

Respectfully submitted,



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Robert W. McCausland
Vice President, Regulatory and
Interconnection
Allegiance Telecom, Inc.
1950 Stemmons Freeway
Suite 3026
Dallas, TX 75207-3118

Dated: January 31, 2000

CERTIFICATE OF SERVICE

I, Michael C. Sloan hereby certify that on January 31, 2000, I caused to be served upon the individuals listed below the Comments of Allegiance Telecom, Inc. in CC Docket 00-4:

Michael C. Sloan

Via Courier:

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B-204
445 Twelfth Street, S.W.
Washington., DC 20554

Janice Myles
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 5-C-327
445 Twelfth Street, S.W.
Washington, DC 20554

Michael K. Kellogg
Auston C. Schlick
Kellogg, Huber, Hansen, Todd &
Evans, P.L.L.C.
1301 K. Street, N.W., Suite 1000 West
Washington, DC 20005

Jamie Heisler
U.S. Department of Justice
Antitrust Division
Telecommunications Task Force
1401 H St. NW, Suite 8000
Washington, DC 20005

ITS, Inc.
1231 - 20th Street, NW
Washington, DC 20036

Via Overnight Delivery:

Katherine Farroba
Public Utility Commission of Texas
1701 M. Congress Ave., P.O. Box 13326
Austin, TX 78711-3326

James D. Ellis
Paul M. Mancini
Martin E. Grambow
Kelly M. Murray
175 E. Houston
San Antonio, TX 78205

Alfred G. Richter, Jr.
175 E. Houston
Room #1275
San Antonio, TX 78205

Ann E. Meuleman
1616 Guadalupe Street, Room 600
Austin, TX 78701-1298

ATTACHMENT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 00-4
Southwestern Bell Communications Services,	)	
Inc. d/b/a/ Southwestern Bell Long Distance	)	
for Provision of In-Region, InterLATA	)	
Services in Texas	)	

DECLARATION OF ROBERT W. McCAUSLAND

1. My name is Robert W. McCausland. I am Vice President, Regulatory and Interconnection for Allegiance Telecom, Inc. ("Allegiance"). My business address is 1950 Stemmons Freeway, Suite 3026, Dallas, Texas 75207.

2. The purpose of my Declaration is to discuss the difficulties Allegiance has experienced obtaining interconnection with Southwestern Bell Telephone. I have personal knowledge of these events.

3. In August 1999, pursuant to Allegiance's interconnection agreement with SWBT, Allegiance requested that SWBT provide interconnection with a third Allegiance switch in the Dallas, Texas area. The switch was necessary to relieve the growing congestion Allegiance was experiencing on its network, and was intended to route the very same traffic that Allegiance had been running through its two existing switches in Dallas.

4. SWBT asserted that because Allegiance planned to "dedicate . . . [the] switch to Internet traffic only," "the interconnection Allegiance seeks does not involve the exchange of local traffic and, therefore, is neither governed by Section 251(c) nor covered by our current Interconnection Agreement." Sep. 22, 1999 Letter from Jo Ann Gallardo to Ron Vehige (Exh. A) (attached).

5. Allegiance attempted to reach a negotiated resolution to the dispute, but maintained throughout that SWBT's position was legally unsupportable. As SWBT well knows, the Texas PUC has held that internet traffic is local exchange traffic governed by Section 251 of the Communications Act. Thus, SWBT must provide interconnection for this traffic pursuant to agreements negotiated under the Act.

6. After months of back and forth between Allegiance and SWBT on this issue, Allegiance informed the Texas PUC about SWBT's intransigence. *See* Nov. 22, 1999 letter from Susan B. Schultz to Chairman Wood and Commissioners Walsh and Pelman (Exh. B). As Ms. Schultz' letter noted, SWBT had "offered no technical or operational reason for refusing Allegiance's order. Rather, SWBT has delayed provisioning the trunks because of compensation issues." *Id.* at 1. As a result, Allegiance was forced for several months to "route its traffic in a less efficient manner than would be possible if it were able to utilize its new switch." *Id.*

7. One week later, SWBT relented and agreed to provide the interconnection, albeit on terms and conditions that conflicted with the parties' interconnection agreement. *See* Nov. 30, 199[9] letter from Michael A. Brosler to Robert W. McCausland (agreeing to provide the connection, but refusing to pay reciprocal compensation for any traffic routed through the new switch) (Exh. C).

8. Simply because SWBT ultimately agreed to provide the interconnection does not mean this issue is moot. SWBT's intentional foot-dragging impaired Allegiance's ability to relieve the congestion on its network, serve new customers, made it more difficult for Allegiance to provide quality service to its existing customers, and thus harmed our ability to compete.

I, Robert W. McCausland, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: 1-31-00

R W McCausland

Robert W. McCausland

McCausland Declaration
Exhibit A

September 22, 1999

Mr. Ron Vehige
Allegiance Telecom, Inc.
1950 Stemmons Freeway
Suite 3026
Dallas, TX 75207

Re: Interconnection Proposal

Dear Ron:

In response to your request to establish an internet-only interconnection in Dallas,TX., the following is provided. It is my understanding that Allegiance plans to have a switch dedicated to internet traffic only and Allegiance is requesting that Southwestern Bell Telephone Company (SWBT) utilize the existing Allegiance/SWBT interconnection agreement to provide an interconnection arrangement to that switch. Also, I understand that Allegiance does not intend to send any other type of traffic to Southwestern Bell's network over this internet-only interconnection.

Section 251(c) of the Telecommunications Act of 1996 (the "Act") requires an ILEC to, among other things, interconnect with a local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access. Inasmuch as the FCC has ruled that internet calls are interstate in nature, the interconnection Allegiance seeks does not involve the exchange of local traffic and, therefore, is neither governed by Section 251(c) nor covered by our current Interconnection Agreement.

SWBT acknowledges its Section 251(a)(1) obligation to interconnect. Should Allegiance wish to pursue an internet-only interconnection under Section 251(a)(1), Southwestern Bell stands ready to negotiate an agreement for that type of interconnection.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Jo Ann Gallardo
cc: Rodney Chappell

McCausland Declaration
Exhibit B

November 22, 1999

The Honorable Pat Wood, III, Chairman
The Honorable Judy Walsh, Commissioner
The Honorable Brett A. Perlman, Commissioner
Public Utility Commission of Texas
1701 N. Congress Ave., 7th Floor
Austin, Texas 78701

Re: Project No. 16251; *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*

Dear Chairman Wood, Commissioner Walsh, and Commissioner Perlman:

Over three months ago, Allegiance Telecom of Texas, Inc. (Allegiance) ordered DS1 trunks from Southwestern Bell Telephone Company (SWBT) to interconnect its new Nortel CVX1800 switch in Dallas with SWBT's network. Allegiance intends to use its new switch primarily to route traffic to its Internet Service Provider (ISP) customers. To date, SWBT has refused to provision the interconnection trunks, apparently because they will be used primarily to carry Internet-bound traffic. As a result, Allegiance is being forced to route its traffic in a less efficient manner than would be possible if it were able to utilize its new switch. SWBT is unlawfully withholding the provisioning of trunks to Allegiance in direct contravention of its obligation under the Federal Telecommunications Act and its repeated promises and commitments to the Commission that it is treating competitive carriers fairly and on a non-discriminatory basis.[1]

The root of the dispute is not over SWBT's technical ability to provision the trunks. SWBT has offered no technical or operational reason for refusing Allegiance's order.[2] Rather, SWBT has delayed provisioning the trunks because of compensation issues. The type of traffic that Allegiance chooses to route over the trunks is a business decision within its sole prerogative. SWBT has no right to veto or otherwise interfere with that decision by refusing to provide the physical facilities necessary to carry SWBT customers' calls to Allegiance's local telephone numbers. The scepter of SWBT's ability

[1] Not only does SWBT have a contractual obligation to provide trunks to Allegiance under its interconnection agreement (Allegiance recently adopted the T2A), but the federal Telecommunications Act of 1996 (FTA) also imposes the general duty on every telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." FTA Section 251(a)(1).

[2] Allegiance is also filing a request in Project No. 20400 to specifically address and resolve SWBT's failure to provision the trunks. However, the Commission and interested parties in Project No. 16251 must also be put on notice of SWBT's anti -competitive behavior.

to behave as a monopoly power has not only been raised in this instance, it has come down with full force of an executioner's axe to prohibit the flow of traffic to Allegiance's new switch.

Allegiance's experience demonstrates that while the Commission is trying to track SWBT's performance on certain specified measures, SWBT continues to erect new barriers to competition. Allegiance will persist in bringing its disputes to the attention of the Commission for resolution as necessary and hopes that the Commission will keep this avenue open to expeditiously resolve the issues and minimize the anticompetitive effects of SWBT's behavior.

Sincerely,

Susan B. Schultz
Attorney for Allegiance Telecom of Texas, Inc.

cc: Katherine Farroba, ALJ
Donna Nelson
All parties of record
Becky Armendariz

McCausland Declaration
Exhibit C

Michael A. Brocker
Director -
Competitive Provider Account Team

SBC Telecommunications, Inc.
Four Bell Plaza, Room 751
Dallas, Texas 75202
Phone 214 464-8805
Fax 214 464-1488

SBC

Via Facsimile

November 30, 1998

Mr. Robert W. McCausland
Vice President - Regulatory and Interconnection
Allegiance Telecom of Texas, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, Texas 75207-3118

Re: Interconnection Proposal – CVX1800

Dear Mr. McCausland:

This is in response to Allegiance's November 22, 1999 letter to the Texas Public Utility Commission relating to its request to interconnect its CVX1800 Internet gateway with Southwestern Bell Telephone Company's ("SWBT") public switched network in Dallas.

As we have previously advised you, SWBT remains willing to interconnect with Allegiance's CVX1800 Internet gateway. However, it is SWBT's position that such interconnection does not fall within the intent or scope of SWBT's current interconnection agreement with Allegiance. That agreement contains terms and conditions established in anticipation of the mutual exchange of telecommunications traffic (i.e., traffic flows on a two-way basis, associated 911 capabilities, etc.). In contrast, we understand that Allegiance's new CVX1800 equipment will be used predominantly, if not exclusively, to deliver calls to Internet Service Providers (ISPs), rather than for the mutual exchange of traditional telecommunications traffic. Thus, this interconnection arrangement is sufficiently different from existing interconnection arrangements to warrant negotiations concerning the appropriate terms and conditions of interconnection.

We understand that you may feel differently about the scope of the current agreement and recommend that we pursue our differences of opinion concerning this issue in the negotiations and, if necessary, any Commission arbitration proceeding that will occur subsequent to the January 22, 2000 expiration of our current contract provisions relating to intercarrier compensation. This will accommodate the immediate interconnection of your equipment while permitting each party to fully pursue its positions with regard to the applicable technical attributes, intercarrier compensation and other terms and conditions associated with this interconnection. We both would be able to fully pursue those positions at the same time we negotiate and/or arbitrate other intercarrier compensation issues.

In particular, SWBT will interconnect with the equipment and we both agree to track the traffic until these issues are resolved by negotiation and/or arbitration. SWBT further will

agree that Allegiance will not at this time be required to compensate SWBT for such interconnection as originally proposed, but Allegiance will agree to a true-up back to the date of interconnection once the issues are resolved by negotiation or arbitration. Likewise, SWBT will not pay Allegiance any terminating compensation for the traffic delivered to such internet gateway at this time, but SWBT will agree to a true-up back to the date of interconnection once the issues are resolved by negotiation and/or arbitration.

We believe this addresses all concerns noted in the November 22, 1999 letter to the TPUC and hope that this proposed solution is acceptable to Allegiance. We look forward to hearing from you and to continuing to work with you to promptly interconnect your new equipment as set forth above.

Yours very truly,

Michael A. Brosler

Cc: Judge Farroba
Susan B. Schultz

ATTACHMENT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 00-4
Southwestern Bell Communications Services,	)	
Inc. d/b/a/ Southwestern Bell Long Distance	)	
for Provision of In-Region, InterLATA	)	
Services in Texas	)	

DECLARATION OF ELIZABETH A. HOWLAND

1. My name is Elizabeth A. Howland. I am National Director, Regulatory and Interconnection for Allegiance Telecom, Inc. My business address is 1349 Empire Central, Dallas, Texas, 75247.

2. I am informed by counsel that the confidential affidavit of John Habeeb, Table 3 (pps. 13-15) contains an estimate of the number of access lines served by facilities-based competitive LECS in various Texas communities. I have reviewed a redacted version of the document that contains SWBT's estimate of the number of lines that Allegiance serves on a facilities basis in Dallas/Ft. Worth and Houston.

3. I have reviewed Allegiance's internal business records documenting the number of lines Allegiance served in Dallas/Ft. Worth and Houston as of December 1999.

4. The number of facilities-based lines SWBT estimates to be the number of lines served by Allegiance in Dallas/Ft. Worth overstates the actual number of Allegiance lines by 123 percent.

5. The number of facilities-based lines SWBT estimates to be the number of lines served by Allegiance in Houston overstates the actual number of Allegiance lines by approximately 190 percent.

6. The number of facilities-based lines SWBT estimates to be the number of lines served by Allegiance in Dallas/Ft. Worth and Houston together overstates the actual number of Allegiance lines by approximately 138 percent.

I, Elizabeth A. Howland, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: January 31, 2000

Elizabeth A. Howland

Elizabeth A. Howland